U.S. Department of Labor

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Issue Date: 30 May 2003

CASE No.: 2002-LHC-00804

OWCP No.: 02-118545

In the Matter of

GARRY W. BOLTON
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.
Employer

and

ACE AMERICAN INSURANCE CO.
Carrier

Appearances: Robert L. O'Brien, Esq. For Claimant
Monica F. Markovich, Esq. For Employer and Carrier

Before: Robert D. Kaplan
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("the Act"), and the regulations promulgated thereunder, as extended by the Defense Base Act, 42 U.S.C. § 1651 et seq. A hearing was held before me in Carlisle, Pennsylvania on October 11, 2002. Claimant filed a brief on March 31, 2003. Service Employers International, Inc. and Ace American Insurance Company (referred to individually and collectively as "Employer") filed a brief on March 31, 2003 and a responsive brief on April 28, 2003.

At the hearing, Claimant objected to portions of the April 3, 2002 deposition of Claimant. (EX 26).[1] Claimant stated that he objected several times on the grounds of relevance starting on page 93 of the deposition. Claimant stated that he only wanted me to strike those portions of Claimant's deposition that he objected to, because other portions after page 93 may be helpful in reaching my decision. (T 17-19) I find only one objection on the grounds of relevance to a question about a criminal conviction of Claimant. (EX 26, p. 183) I overrule this objection because the material is relevant, as will be explained later in this decision. Claimant also objected to the form of Employer's question and on the grounds of privileged information of Claimant. (EX 26, pp. 165, 178) I find the latter objections are without merit. Claimant also objected to portions of EX 25 that contain evidence of a criminal conviction of Claimant. This objection is also overruled for the reasons set forth below.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

The parties entered into the following stipulations. (T 1-43; JX 1)

1 On March 23, 1996, Claimant had an accident in which he sustained an injury to his right arm and right shoulder while operating a hose reel on a refueling truck.

2. An employer-employee relationship between Employer and Claimant existed at the time of the injury.

3. The shoulder/arm injury arose within the course and scope of Claimant's employment by Employer.

4. The parties are subject to the Act.

5. Claimant reached maximum medical improvement with regard to his low back condition as of January 14, 2000, based on the opinion of Dr. Lucian Bednarz.

6. Employer paid Claimant compensation for temporary total disability from March 23, 1996 to May 11, 2001 at the rate of $593.91 per week.

7. Employer paid Claimant compensation for permanent partial disability from May 12, 2001, and continuing, at the rate of $273.91 per week.

8. Employer paid Claimant medical benefits under Section 7 of the Act in the amount of $119,677.70.

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[1]The following abbreviations are used. "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "JX" refers to Joint Exhibits; and "T" refers to the transcript of the October 11, 2002 hearing.

In his brief, Claimant does not present any argument regarding the nature and extent of the right arm and shoulder injury, and concedes that he has no further disability related to these areas. (Claimant's Brief, pp. 6-7) ("The shoulder injury resolved itself after his return and rehabilitation in Florida" by Dr. Marc Calkins ending on May 31, 1996.) However, Claimant contends that he has disability due to pain in his lower back that is causally related to the March 23, 1996 accident. Claimant maintains that this back pain renders him permanently totally disabled. (Claimant's Brief, pp. 3-4).

Employer argues that since May 11, 2001 Claimant has had no disability from the injury to his right arm and shoulder. Employer also posits that Claimant did not sustain any back injury on March 23, 1996. In the alternative, Employer contends that "if it is determined that Claimant sustained a back injury as a result of the March 23, 1996 injury, then the evidence establishes that Claimant is only partially disabled and can return to work in suitable alternative employment." (Employer's Brief, pp. 2-5) Finally, Employer seeks a credit for Claimant's failure to timely report earnings when requested to do so. Although JX 1 contains a reference to an alleged overpayment of $29,676.04, Employer's brief does not provide any argument regarding that sum.

II. ISSUES

The issues remaining to be resolved are:

1. Whether Claimant's March 23, 1996 injury to his right arm and shoulder caused him to be disabled after May 11, 2001 and, if so, what is the nature and extent of this disability.[2]

2. Whether Claimant sustained a back injury as a result of the March 23, 1996 accident and, if so, what is the nature and extent of disability due to the back condition.

3. What is Claimant's average weekly wage.

4. Whether Employer is entitled to a credit for Claimant's failure to report earnings.

5. Whether Employer is liable for two medical bills for Claimant's treatment at The Heart Group and Carlisle Hospital.

[2]I shall consider this question despite Claimant's concession, noted above, that the arm and shoulder injuries resolved within two months after the March 23, 1996 accident.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

On March 23, 1996, the date of the accident, Claimant was working for Employer as a truck driver in Bosnia Herzegovina. Scott Curd, a senior manager of human resources with Employer, testified at a deposition on November 21, 2002 that in 1996 Employer, through its parent company, Brown & Root, had a contract with the U.S. Defense Department to provide civilian support for military operations, including transport services. (EX 10, pp. 1-6) Mr. Curd stated (EX 10, p. 22):

> We move equipment for them. We move a great amount of equipment, particularly early on . . . because the military doesn't have the manpower to move their own equipment. So we drive their trucks and other military vehicles from one location to another and move their equipment and supplies for them.

In December 1995, President Clinton ordered U.S. Army personnel to deploy to Bosnia Herzegovina for peacekeeping missions. (EX 44) Subsequently, Employer began hiring civilians to fill various positions to support this operation. Claimant testified at the October 11, 2002 hearing that he was hired as a truck driver under a contract that had an indefinite duration. Claimant began working for Employer on February 16, 1996. (EX 9; EX 10, pp. 11-12) Mr. Curd explained that employment contracts for this operation had an indefinite duration due to the fact the military was not sure how long its operations would last in the Balkans region. (EX 10, p. 9) Claimant's contract was for employment lasting a minimum of three months. (EX 10, p. 11) Claimant's base salary was $2,259.00 per month, plus bonuses depending on location and hazard conditions. (EX 9, p. 2) Claimant testified that he was told that after his initial three month time period, he could transfer to an operation in Vietnam with guaranteed employment of five years. (T 83 - 85)

Claimant was assigned, under his contract, to support the military operations in Bosnia. (EX 10, p. 18) He arrived in Bosnia on February 17, 1996 and was assigned to living quarters near a military base called Camp Kime. Claimant testified that his normal morning of work consisted of driving a fuel truck in order to deliver fuel to tanks at several bases in the vicinity. The fuel truck was equipped with an electric hose reel that allowed a fuel hose to extend from the truck to the fuel tanks. Upon completing this work and providing general maintenance for the fuel tanks, Claimant often went to Camp Kime in the afternoon where he assisted carpenters in building structures there. (EX 9, p. 46; T 98-100)

Claimant testified that on March 23, 1996, he drove his fuel truck to Camp Kime to fill power generator fuel tanks. Due to the position of the tanks, Claimant had to stretch the fuel truck's hose to the end of the reel in order to fuel the tanks. After he completed fueling the tanks, Claimant activated the electric hose reel to bring the hose back to the truck. It appears that as the hose passed by Claimant's right arm, the hose caught Claimant's right arm and pulled it into the reel. Claimant

testified that, "it threw my arm and I went backwards right behind the truck."[3] (T 98-106) Claimant stated,

> . . . my right arm hurt like all get out. My left leg gave away, I couldn't stand on it at all. I kept trying to stand up. My counterpart ran over to me and was trying to help me up . . . [A supervisor] came over to me and told me he was taking me to the hospital. And I asked him to wait, let me shake it off, it, it was no big deal.

(T 106) Employer's accident report reveals that on March 23, 1996 Claimant was treatment by a medic, Patrick J. Hall. (EX 31) In Mr. Hall's report dated March 25, 1996 he stated that Claimant, "had severe pain in his right shoulder and arm with limited range of motion." (EX 31, p. 3) Claimant then was taken to a base hospital for treatment. Claimant testified he informed a neurosurgeon at the base hospital that his right arm and lower back hurt. (T 108-109) On March 30, 1996, Claimant was "demobilized" which I infer means that he was sent back to the United States on that date. (EX 11, p. 3; T 108-109) Claimant recalled subsequent visits with doctors in Florida and Pennsylvania. Claimant also testified that he underwent several surgeries and procedures to treat his back condition. (T 109-111) Claimant stated that he currently takes Zanaflex for back spasms and Oxycontin and Vicodin for pain. (T 114-115)

Claimant testified that he has tried to remain active since the March 23, 1996 accident. Claimant owns a tractor-trailer and hires drivers to drive loads for him. Claimant also attempted to operate a diner business he owned for several months. Claimant also has a woodworking hobby and he creates sculptures for family and friends. Additional activities of Claimant after returning to the United States are set forth below in the discussion section.

Karen J. Pittelli, Claimant's wife, testified at the hearing and described Claimant's lower back and left leg pain. Ms. Pittelli also described Claimant's restaurant business and trucking business and explained that while these endeavors gave Claimant something to do, they were not profitable. Ms. Pittelli also explained that Claimant's woodworking hobby has helped him to stay busy. (T 201-215)

The record contains the reports and testimony from numerous physicians who have treated or examined Claimant for his right arm, shoulder and lower back and left leg pain. Their opinions are set forth below in the discussion section.

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[3]Claimant's testimony regarding the accident is unclear. From his testimony alone, I cannot determine if his arm was actually pulled into the hose reel or whether his arm was pulled hard. It is also unclear if Claimant's entire body was pulled towards the truck. Claimant stated that "it threw my arm." I infer that Claimant's right arm was abruptly jerked toward the hose reel. (T 98-106; RX 26, pp. 121-123)

The record also contains the reports and testimony of several vocational experts who identified suitable alternate employment for Claimant. These opinions and other vocational evidence are discussed below.

B. Discussion

1. Claimant was temporarily totally disabled from March 23, 1996 to July 11, 1996 due to the right arm and shoulder injury

Claimant's brief states, "[T]he shoulder injury resolved itself after his return and rehabilitation in Florida." (Claimant's Brief, pp. 7-8) Claimant also stated at the hearing that he totally recovered from his shoulder injury, "a month or so, maybe two months after I had gotten back to the States." (T 168) Dr. Marc S. Calkins, who treated Claimant in Florida, reported on May 31, 1996 that Claimant's right arm and shoulder pain had decreased significantly, but that Claimant reported some minimal pain there. Dr. R. E. Griff reported on July 26, 1996 that Claimant still reported some shoulder and right arm pain but that his right arm and shoulder had improved significantly since the physician last examined Claimant on June 12, 1996. (EX 34, p. 5) The other physicians of record offered extensive opinions regarding the degree of Claimant's disability due solely to his back condition.

I find that Claimant's right arm and shoulder reached maximum medical improvement as of July 11, 1996 – at the latest – when Claimant began to see Dr. Hong S. Park for treatment of his back condition. Claimant testified that his right arm and shoulder felt better within two months after his return to the United States and that they no longer give him any discomfort. Claimant demonstrated at the hearing that he has regained full mobility of the right arm and shoulder. Claimant extended his arm and shoulder directly over his head and stated that "most people with rotor (sic) cuff (injuries) cannot do that." (T 167-168) Further, Dr. Park began to treat Claimant exclusively for his back condition on July 11, 1996, and no further treatment was provided for Claimant's right arm and shoulder injury as of that date. Based on the foregoing, I find that Claimant was temporarily totally disabled from March 23, 1996 until July 11, 1996 due to his right arm and shoulder injury. Claimant reached maximum medical improvement due to this injury on July 11, 1996 and, at that time, no longer had any disability due to injury to his right arm and shoulder. As Claimant was paid compensation for temporary total disability from March 23, 1996 to May 11, 2001, he is not entitled to additional compensation for the injuries to his shoulder and arm.

2. Claimant has failed to establish that his lower back condition was caused by the accident on March 23, 1996

Claimant contends that he is permanently totally disabled due to a causally related injury to his low back, while Employer argues that the back condition did not arise out of Claimant's job with it. Claimant posits that Employer should be barred by the doctrine of laches from contesting that his low back condition is causally related to the March 23, 1996 accident because Employer waited "almost eight years after the injury" to controvert causation, and noting that Employer has paid for

Claimant's medical treatment for this condition. Claimant also states that Employer's belated controversion of causation is prejudicial to him. (Claimant's Brief, p. 13) I find that Claimant's laches argument is without merit. The Benefits Review Board ("Board") has consistently held that the doctrine of laches does not apply to cases under the Act. Hargrove v. Stachen Shipping Co., 32 B.R.B.S. 11 (1998); Simpson v. Bath Iron Works Corp., 22 B.R.B.S. 25, 28 (1989); Lewis v. Norfolk Shipbuilding and Dry Dock Corp., 20 B.R.B.S. 126, 130 (1987). I also note that Claimant was notified at least 14 months before the hearing that Employer was contesting that Claimant's back condition was causally related to the March 23, 1996 accident, as Employer's contention was made in its Form LS-207 dated August 8, 2001. (EX 5, p. 3) Consequently, Claimant was not prejudiced by Employer's contention.

Section 20(a) of the Act provides that, "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920. Under § 20(a) of the Act, Claimant may be entitled to a presumption that his injury is causally related to his employment. Claimant bears the burden of establishing entitlement to the § 20(a) presumption by establishing a prima facie case. Claimant must show that he (1) suffered an injury, harm, or pain and (2) working conditions existed which could have caused the harm. See U.S. Industries/Federal Sheet Metal v. Director, OWCP, 455 U.S. 608 (1982). Claimant must establish each element of his prima facie case by affirmative evidence. Kooley v. Marine Industries Northwest, 22 B.R.B.S. 142 (1989); Director, OWCP v. Greenwich Colleries, 512 U.S. 267 (1994). If the § 20(a) presumption has been invoked by the evidence, the employer has the burden of establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 B.R.B.S. 324 (1981). The employer must present evidence that is sufficiently specific and comprehensive to sever the potential connection between the particular injury or disease and the job. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir. 1976). If the § 20(a) presumption is successfully rebutted, it falls out of the case and all of the evidence must be weighed to resolve the causation issue. Hislop v. Marine Terminals Corp., 14 B.R.B.S. 927 (1982).

Claimant testified that on March 23, 1996 when he reeled in the fuel truck's hose, it came across his arm and "threw" his arm and he "went backwards right behind the truck." Claimant testified that not only were his right arm and shoulder in pain, but that he could not stand or walk on his left leg. Claimant stated that he attempted to "walk it off," but that, "when I got done fueling, the supervisor told me to get out of the truck and stand up, and I couldn't do it." (T 106-107) After being taken to the camp medical center, Claimant stated that,

> They sent me to this other little base that I went to be with the other camp boss. I stayed with him for a couple weeks and they sent me back to the hospital for the check-up. The orthopedic surgeon called in a neurosurgeon and he told me not to lie to him, to tell him the truth, that (sic) what was wrong. And I told him the main, the main pain is in my arm, but I do have pain that was in my lower back.

(T 108)

The only documentation of Claimant's injury and treatment on March 23, 1996 are the accident report of medic Patrick J. Hall and the report of Dr. Douglas M. Duncan.[4] (EX 3; EX 31, p. 3) Neither report contains any indication that Claimant sustained a back injury as a result of the March 23, accident. Mr. Hall reported:

> I was informed that one of our truck drivers injured his arm. I arrived there and saw Garry Bolton #44825. He stated that he got his arm caught in a mechanical roller on the truck and injured his right arm and shoulder. Upon examination, I could see no abrasions or lacerations. [He] did however have severe pain in his right shoulder and arm with limited range of motion. I immobilized his arm and shoulder and transported him to the aid station at Camp Kime. He saw the Physician Assistant 2nd Lt. Duncan who requested that I transport him to . . . Camp Gentry for an x-ray and to see the orthopedic doctor.
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> We arrived at Camp Gentry at 1100 a.m. and he saw the Orthopedic Surgeon, Major Dykes. He was examined and had his right shoulder and wrist x-rayed. No abnormalities were noted on the x-rays. The patient was released with a right shoulder sprain and medial nerve involvement right hand. The patient was placed on light duty (i.e. no driving) with limited use of right shoulder and arm for one week . . . He returned to Camp Kime and his supervisor Steve Johnson was notified.

(EX 31, p. 3) In his report dated March 23, 1996, Dr. Duncan stated that Claimant had a "sprained right shoulder with medial nerve involvement - right hand." (EX 3, p. 2)

Subsequently, Claimant was sent back to the United States for recovery. (T 108) The evidence of record shows that Claimant was treated by the following doctors upon his return.

Dr. Marc S. Calkins[5]

In an April 23, 1996 report of a medical examination, Dr. Marc S. Calkins reported that Claimant was referred to him in Florida due to the fact that Claimant continued to experience "multiple problems with the right arm which consist of right shoulder pain and right elbow pain." (EX 32, p. 1) Dr. Calkins performed a CT scan of the shoulder and found no evidence of a rotator cuff

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[4]Apparently, Dr. Duncan also provided a more extensive report in EX 31, however this is entirely illegible and I give it no weight. (EX 31, p. 1).

[5]Dr. Calkins' qualifications are not of record. Henceforth, where a physician's qualifications are not set forth herein, the record does not contain the qualifications.

tendon tear, but stated that such an injury was possible. (EX 32, pp. 1, 5, 6) Dr. Calkins' assessment was that Claimant had sustained a right elbow sprain, and had cubital and carpal tunnel syndrome. (EX 32, p. 1) Dr. Calkins' report contains no reference to any complaint of back pain at that time. After several medical examinations of Claimant, Dr. Calkins reported on May 31, 1996 that Claimant's right arm and shoulder had healed very well and that he could return to driving "as soon as he feels he is capable of handling the job." (EX 32, p. 7) At that time, Dr. Calkins also reported Claimant had pain in the "right posterior scapulothoracic bursa area." (EX 32, p. 7) Dr. Calkins injected pain medication in that area, but the physician noted that Claimant had no pain on any flexion tests.

Dr. Gregory J. Piacente

On May 8, 1996, Dr. Gregory J. Piacente (Board-certified in internal medicine and neurology) examined Claimant and performed an electrodiagnostic study of Claimant's shoulder. The physician opined that the nerve study revealed no evidence of damage. Dr. Piacente stated:

> This is a normal right upper extremity nerve conduction study and EMG. Specifically, there is no conduction block of the median nerve through the carpal tunnel or in the ulnar nerve through the cubital tunnel. I do not find evidence of brachial plexus involvement such as proximal sensory loss or denervation.

(EX 33) Dr. Piacente's report contains no reference to any complaint of back pain at that time.

Dr. R. E. Griff

Dr. R. E. Griff examined Claimant on June 12, 1996, and also reviewed the opinions of Dr. Piacente and Dr. Calkins. Dr. Griff focused much of her examination on the right upper extremity and diagnosed Claimant with "severe cervical, supraspinatus, trapezius strain/sprain combined with forearm flexor and extensor tendonitis." (EX 34, p. 2) Dr. Griff recommended pain medications and a course of physical therapy. Dr. Griff also reported that Claimant "is also having lower back pain particularly limited to the right side." However, Dr. Griff noted that Claimant's sitting and supine leg raise tests were both negative at that time. Dr. Griff recommended Claimant for physical therapy for the right arm and shoulder and scheduled a follow up visit. Dr. Griff's report includes the June 17, 1996 report of a physical therapy session with Richard L. Baer. Mr. Baer noted that while a recent EMG test was negative, Claimant reported having pain in the right shoulder, arm, and neck. (EX 34, p. 3) Mr. Baer prescribed a course of treatment for Claimant's right arm and shoulder. Mr. Baer did not report that Claimant complained of back pain at that time. In a June 26, 1996 report of Claimant's follow-up visit Dr. Griff stated that she examined Claimant and that his shoulder and right arm pain had improved significantly. This report by Dr. Griff contains the first documented complaint of lower back and left leg pain by Claimant:

> At the same time, he reports lower back pain which he failed to discuss on the visit of June 12, 1996. He says that this pain started shortly after his accident in Bosnia. He describes it as a pain that goes down his left leg.

(EX 34 p. 5) Dr. Griff opined that Claimant could have sustained a back injury in Bosnia based on what Claimant reported at that time. The physician recommended further physical therapy and a course of pain medications for Claimant's lower back. (EX 34, pp. 5-6)

Dr. Hong S. Park

In an April 4, 2002 deposition, Dr. Hong S. Park testified that he treated Claimant from July 11, 1996 until February 3, 1997, and subsequently on May 24, 2001 and March 28, 2002. (CX 2, pp. 9-10) Dr. Park stated that he had treated Claimant for continued back pain which the physician explained was a result of a "pinched nerve" from a herniated disc. Dr. Park stated that he was unaware of any condition that may have contributed to Claimant's back problems other than the March 23, 1996 accident. (CX 2, p. 20) Dr. Park stated that Claimant's back condition deteriorated from February 1997 to May 2001. (CX 2, p. 11) During this time, Dr. Park noted that Claimant had undergone several back surgeries in an effort to eliminate his back pain and that, due to scar tissue, Claimant, "lost a lot of mobility in his back, also his left leg." (CX 2, pp. 12-13) After reviewing Claimant's condition on March 28, 2002, Dr. Park noticed an improvement in walking ability, and stated, "I was a little happier with his progress." Dr. Park opined that Claimant reached maximum medical improvement on May 24, 2001. (CX 2, p. 17) Dr. Park noted that Claimant was prescribed several pain medications for his back condition. (CX 2, pp. 25-26) Based on the degree of Claimant's reported back pain since Dr. Park began treating Claimant, it was his conclusion that Claimant was totally disabled from performing any "meaningful, competitive, gainful employment." (CX 2, p. 60)

Dr. Jason L. Litton

In a report of a February 24, 1997 medical examination, Dr. Jason L. Litton (Board-certified in orthopedic surgery) reported that Claimant had full range of motion in his neck and "no trapezius tenderness." (EX 35, p. 5) Dr. Litton also noted, "His biceps and triceps reflexes are symmetrical . . . [s]ensation, muscle power and circulation in both upper extremities are intact." Dr. Litton also examined Claimant's lower back and reported that Claimant had some tenderness but that the lower back did not appear to be inflamed. Dr. Litton reported that radiographs performed in June and July 1996 did not show any abnormalities in the right shoulder or Claimant's back. Dr. Litton noted that an MRI of Claimant's back on July 29, 1996 showed a moderate disc herniation. Dr. Litton concluded by stating:

> I told him right up front that his neck and upper right extremity pain, although it continues, is not supported by objective findings and I would not support any disability based on the injury in 1996 as cause

> for this neck and upper right extremity symptoms . . . As far as his low back and left lower extremity are concerned, he is still symptomatic following surgery and is unable to do his job . . .

(EX 35, p. 6)

In a report of a March 18, 1997 examination, Dr. Litton noted that, "[Complainant] looked rather pathetic. He has pain with straight leg raising on the left side causing left buttock pain and a diminished left ankle reflex just as he had before." (EX 35, p. 8) In a report of an April 29, 1997 medical examination, Dr. Litton reported that Claimant was still experiencing neck and low back pain, but also stated, "I feel that Mr. Bolton is exaggerating his symptoms. I am going to have a Functional Capacity Evaluation performed, and if it shows exaggerated pain behavior, I am going to ask Mr. Bolton to return to his regular job." (EX 35, p. 9) Dr. Litton examined Claimant on May 20, 1997 and reported that "I feel his symptoms are out of proportion to the injury he received and feel that he is capable of doing light duty at this time." (EX 35, p. 11) Dr. Litton scheduled no further treatment with Claimant.

Dr. Steven B. Wolf

On June 19, 1997, Dr. Steven Wolf (Board-certified in orthopedic surgery) examined Claimant. Dr. Wolf stated in his report that Claimant had sciatic nerve tension which produced back pain, but that all other tests showed normal results. Dr. Wolf recommended that Claimant attend some physical therapy sessions and stated the he would examine Claimant at a future follow up visit. (EX 36, p. 4) However, after an August 18, 1997 examination, Dr. Wolf opined that Claimant did not have any sciatic nerve tension based on what the physician stated were "normal levels of motion." Dr. Wolf opined that Claimant could perform sedentary work. (EX 36)

Dr. Perry J. Argires and Dr. James P. Argires

Dr. Perry J. Argires and Dr. James P. Argires began treating Claimant in approximately November, 1997. (CX 8-A)[6] Both physicians examined Claimant on several occasions from November 1997 to November 1999. The physicians also performed several surgical operations on Claimant's lower back in an effort to relieve some of Claimant's back pain.[7] The record evidence

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[6]Claimant submitted numerous reports under CX 8. For reference purposes, I have grouped the reports into separate exhibits and marked the reports as follows. "CX 8-A" contains the reports of Dr. Perry J. Argires and Dr. James P. Argires. "CX 8-B" contains the reports of Dr. Richard C. Steinman.

[7]Both physicians reported generally that Claimant had undergone multiple back surgeries, one of which apparently took place outside the United States. However, the only documentation of surgeries in the record are the back operations performed by Dr. Perry J. Argires on March 19, 1999 and July 17, 1999. (CX 8-A) On March 19, 1999, Claimant underwent an anterior fusion procedure

indicates that both physicians operated on Claimant's back on July 17, 1999 and March 19, 1999. In reports from 1997 to 1999, both physicians opined that Claimant could not return to work and was permanently disabled. In an October 1, 1997 report of a medical examination, Dr. James Argires opined that Claimant's back pain was due to a nerve root trapped with epidural and perineural fibrosis. In a February 17, 1999 report of a medical examination, Dr. James Argires noted that Claimant still experienced significant back pain and that prior surgeries were unsuccessful in resolving the pain. Dr. James Argires reported that this back pain was due to "peridural and perineural fibrosis." In a February 25, 1999 report of a medical examination, Dr. Perry Argires noted that Claimant had limited range of motion and flexibility. Dr. Perry Argires also reported that Claimant still reported low back pain but Claimant's prior back surgeries had healed without incident. The reports of Dr. James Argires and Dr. Perry Argires also include multiple reports of MRI scans of Claimant's lower back, some of which reported no significant findings, while others revealed a mild developmental narrowing of the spinal canal. (CX 8-A)

Dr. Paul S. Lin

Dr. Paul S. Lin (Board-certified in orthopedic surgery) examined Claimant on March 10, 1999. Dr. Lin reported no significant findings and stated, "Mr. Bolton's neurologic examination today is relatively benign." Although Dr. Lin stated that there were several surgery options, the physician opined that further surgery would not improve Claimant's condition. Dr. Lin stated that Claimant's prognosis was "poor" and that Claimant should be limited to sedentary employment. (EX 37, p. 6)

Dr. Lucian P. Bednarz

Dr. Lucian Bednarz (Board-certified in physical medicine and rehabilitation) testified in a deposition taken on April 4, 2002. (EX 30) During this deposition, Dr. Bednarz reiterated many of the findings of his report of a January 14, 2000 medical examination. (EX 29) Dr. Bednarz reported that Claimant's physical examination was unremarkable and that Claimant had a "subjectively restricted" range of motion of 30 degrees of flexion and 10 degrees of extension. (EX 30, p. 12) Dr. Bednarz noted that Claimant's responses to a series of "pain questionnaires" indicated "high symptom amplification." Dr. Bednarz diagnosed Claimant with an injury to the low back and shoulder region from which he had completely recovered. (EX 29; EX 30, p. 14) With regard to the back condition, the physician opined that Claimant had reached maximum medical improvement at the time of the evaluation and that Claimant was capable of returning to work with restriction to light activities. (EX 29; EX 30, pp. 14-19) Dr. Bednarz also reviewed several jobs and opined that Claimant could perform the job of a truck dispatcher. (EX 30, p. 23, 54-60)

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at the L5-S1 level of the spine. On July 17, 1999, Claimant underwent a laminectomy for decompression of the thecal sac and nerve roots. Claimant and several other physicians also referred to a back surgery performed by Dr. Polichek sometime after Claimant first visited Dr. Park on July 11, 1996. However, I find no report from Dr. Polichek in the record that explains his findings or medical opinion.

Dr. Robert C. Steinman

Dr. Robert C. Steinman examined Claimant approximately 10 times from December 19, 1999 through March 14, 2001. (CX 8-B) At each visit, Dr. Steinman noted that Claimant's back had limited mobility and that, as a result, Dr. Steinman did not expect that he "could ever work full-time." (CX 8-B) On several occasions, Dr. Steinman recommended that Claimant attempt to increase his daily activities. The physician also reported that Claimant walked slowly using a cane to support himself. Dr. Steinman disagreed with Dr. Bednarz's suggestion that Claimant exaggerated his pain symptoms, stating on April 5, 2000, "I am pleased to follow the suggestions of Dr. Bednarz, but I do not believe that Mr. Bolton is exaggerating." (CX 8-B) In the most recent report, March 14, 2001, Dr. Steinman reiterated many of his previous statements and reported Claimant had limited ability to bend forward and backward, as well as Claimant's pain through his left leg, but no other problems. (CX 8-B)

Dr. Thomas D. DiBenedetto

In a December 17, 2002 deposition, Dr. Thomas D. DiBenedetto (Board-certified in orthopedic surgery) stated that he performed a medical examination of Claimant on July 9, 2002. In his deposition, Dr. DiBenedetto reiterated many of the findings of his July 9, 2002 medical report. (EX 27) Dr. DiBenedetto reviewed Claimant's medical history as well as the deposition testimony of Dr. Park and Dr. Bednarz. (EX 28, p. 12) Based on his examination, Dr. DiBenedetto opined that the objective findings were not consistent with Claimant's subjective complaints. (EX 28, pp. 10-11) Dr. DiBenedetto opined that Claimant showed signs of "symptom magnification." (EX 28, p. 11) Dr. DiBenedetto also opined that Claimant did not sustain any injury to his back on March 23, 1996 and that Claimant reached maximum medical improvement regarding his shoulder and arm injury a few weeks after the accident. (EX 28, pp. 12-13) After reviewing Claimant's medical records and finding no report of a back injury shortly after Claimant's injury, Dr. DiBenedetto stated, "I assume that he would have given that to the treating parties initially, that his back was injured and not just his shoulders (sic)." (EX 28, p. 26) Dr. DiBenedetto noted that the medical records showed Claimant first sought treatment for back pain in June and July 1996 and he opined that Claimant's back injury was due to a disc herniation that occurred between June 12, 1996 and July 26, 1996. (EX 28, pp. 35-36) In his August 24, 2002 report, Dr. DiBenedetto also attributed Claimant's lower back condition to failed back surgeries. (EX 27, p. 8) Dr. DiBenedetto did not consider Claimant to be totally disabled, reasoning that, "[Claimant] did tell me that he was trying to be as active as possible, so I thought he could do some work." (EX 28, p. 16) Dr. DiBenedetto reviewed the job analyses provided by Employer and opined that Claimant could successfully perform the job of a truck dispatcher. (EX 28, p. 17)

With regard to the etiology of Claimant's back condition, I find the evidence is sufficient to invoke the §20(a) presumption. Dr. James Argires, Dr. Perry Argires, Dr. Park, and Dr. Steinman examined Claimant on several occasions and documented Claimant's back problems, starting in

July 1996. Dr. James Argires and Dr. Perry Argires performed several surgeries on Claimant's back in 1999. Claimant testified that he experienced pain in his lower back and left leg shortly after being pulled into the fuel hose reel, and that he was unable to walk immediately after the injury on March 23, 1996. Employer argues that Claimant did not submit prima facie evidence of a causally related back injury because his initial treatment shortly after the injury was only for the shoulder injury. (Employer's Brief, p. 3) However, in Dangerfield v. Todd Pacific Shipyards Corp., 22 B.R.B.S. 104 (1989), the Board found that a claimant established a prima facie case when, subsequent to the injury, the claimant was treated by several physicians for a low back injury and the claimant sought benefits for a low back injury arising from a fall at work. Id. at 107. The Board noted that the claimant's initial injury report did not mention a low back injury but the Claimant later articulated a connection between the alleged injury and workplace conditions. Id. Moreover, in the instant case, Claimant stated that he was initially reluctant to report his back pain upon his return to the United States because he was afraid that Employer would not recall him to work.[8] Claimant stated that his main concern "was my shoulder at that time, because in the very beginning it did hurt. I did have a rotor cuff, my hip did hurt, and my leg hurt." (T 108 - 109)

Based on the foregoing, I find that Claimant has produced evidence that he sustained an injury to his back and that working conditions existed which could have caused this injury. Consequently, I find that Claimant is entitled to the § 20(a) presumption that his lower back condition and related left leg pain are causally connected to the March 23, 1996 accident.

Although I find that Claimant has invoked the § 20(a) presumption, I also find that Employer has rebutted the presumption. The most significant of Employer's evidence is the medical opinion of Dr. DiBenedetto that explicitly addresses the causation of Claimant's back problems. Dr. DiBenedetto noted that there was no medical evidence that Claimant's accident on March 23, 1996 resulted in a back injury. (EX 27, p. 8) At his December 17, 2002 deposition Dr. DiBenedetto opined that Claimant's back injury was likely caused by an acute disc herniation that occurred between June 12, 1996 and July 26, 1996, rather than on March 23, 1996. (EX 28, pp. 35-36) As support for his conclusion that Claimant's back condition is not causally related to the on-the-job accident, Dr. DiBenedetto reasoned that Claimant had a negative straight-leg raising test on June 12, 1996, indicating that he did not have a herniated disc at that time. However, an MRI taken on July 26, 1996 showed evidence of a disc extrusion. Dr. DiBenedetto explained that this disc extrusion was typical of acute disc herniation cases. (EX 28, pp. 32-36) I find that Dr. DiBenedetto's opinion constitutes substantial evidence sufficient to rebut the § 20(a) presumption.

The final analytical step is to weigh the entire record relating to causation of Claimant's back condition. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir. 1976); Hislop v. Marine Terminals Corp., 14 B.R.B.S. 927 (1982). Claimant has not offered any medical opinion that reasonably supports finding a causal link between his back condition and the March 23, 1996 accident. While Dr. Park stated that Claimant's back condition was caused by the March 23, 1996

[8]While I accept Claimant's explanation for purposes of invoking the § 20(a) presumption, I reserve for later my ultimate finding regarding Claimant's credibility.

accident, the physician conceded that he based this conclusion only upon what Claimant told him — i.e., that Claimant had experienced back pain on March 23, 1996. (CX 2, p. 36) Dr. Steinman extensively documented Claimant's back pain symptoms, but did not offer an opinion regarding causation. (CX 8-B) The opinions of Dr. James Argires and Dr. Perry Argires extensively document their surgeries and treatments of Claimant's back condition, but do not offer an opinion regarding the causation of his back condition. (CX 8-A) Dr. Bednarz did not offer a specific opinion regarding the causation of Claimant's back injury but he did state that treatment Claimant received for plantar fasciitis was not related to the March 23, 1996 injury. (EX 30, p. 24)

Further, the physicians who treated Claimant shortly after the March 23, 1996 accident did not indicate that Claimant had any lower back or left leg problems. The first physician who documented any complaints of back pain was Dr. Griff. Dr. Griff first documented Claimant's back pain, extending down his left leg on June 26, 1996, and questioned whether Claimant may have sustained a back injury during the March 23, 1996 accident.[9] At most, Dr. Griff only speculated about a possible source of Claimant's back pain, and I do not find her report to be as persuasive as Dr. DiBenedetto's opinion that specifically addresses the causation of Claimant's back pain. Additionally, as Dr. DiBenedetto noted, Dr. Park, Dr. James Argires, and Dr. Perry Argires did not begin to treat Claimant for back problems until about July 1996. That treatment corresponds to the time Dr. DiBenedetto reported that the disc herniation likely occurred. Based on the foregoing, I give the greatest weight to Dr. DiBenedetto's opinion regarding the causation of Claimant's back condition.

I also find considerable inconsistencies in Claimant's testimony regarding his back condition. First, I find it inconsistent that Claimant testified he could barely walk from pain in his back and left leg after the accident on March 23, 1996 and that several people witnessed this inability to walk, but no independent report supports this testimony. After the accident, Claimant stated that a supervisor told Claimant that if he couldn't stand up, he would have to be taken to the hospital. (T 107) Claimant testified that apparently after the supervisor observed that Claimant was unable to stand, a report was made to Claimant's camp boss and he was taken to the base hospital. Claimant also insisted at the April 3, 2002 deposition that he specifically sought treatment immediately after the injury for his lower back pain, and that he was told he was being sent home due to his back pain. (EX 26, p. 121 - 126) However, Claimant's account of his back pain is inconsistent with the account of Mr. Hall, the medic who transported Claimant to the hospital. Mr. Hall reported:

> On 23 March 1996 at approximately 0900 I responded to a call for assistance from Camp Kime. I was informed that one of our truck

[9]Dr. Griff actually noted that Claimant reported lower back pain on June 12, 1996. However, during this visit, Claimant told Dr. Griff that the pain was on his right side, as opposed to shooting down the left leg. Dr. Griff reported that sitting and supine straight leg raising tests were negative at that time. Moreover, in a subsequent visit on June 17, 1996, Claimant did not indicate that he was experiencing any back pain. As the nature of the June 12, 1996 back pain is unclear, I find that the first documented report of credible back pain was made on June 26, 1996.

> drivers injured his arm. I arrived there and saw Garry Bolton #44825. He stated that he got his arm caught in a mechanical roller on the truck and injured his right arm and shoulder.

(EX 31, p. 3) This report strongly suggests that Claimant only had an arm and shoulder injury that required medical attention, contrary to Claimant's account of the events. Nor did the camp medical assistant, Dr. Duncan, treat Claimant for a back injury or inability to walk or stand up. Dr. Duncan's report states only that Claimant had right arm and shoulder injuries.

Further, Claimant's testimony is contradicted by the fact that the record contains no report that Claimant complained about any lower back and left leg pain until June 26, 1996. The first physician who treated Claimant after he returned to the United States, Dr. Calkins, treated Claimant almost exclusively for right arm and shoulder pain. On Claimant's third visit to Dr. Calkins on May 31, 1996, the physician reported that Claimant had some back pain on his right side as opposed to the lower back pain shooting down the left leg that Claimant alleges. Dr. Calkins gave Claimant an injection for this pain but the physician diagnosed this pain as bursitis and stated that Claimant could return to work. (EX 32, p. 7) Claimant was next examined on May 8, 1996 by Dr. Piacente, who did not report any complaint of back pain. As previously mentioned, the first physician who documented any back pain consistent with Claimant's alleged symptoms was Dr. Griff during the June 26, 1996 visit. However, this report also conflicts with Claimant's testimony. Claimant told Dr. Griff at that time that he began to notice back pain "shortly after his accident in Bosnia," which appears to contradict Claimant's testimony at the hearing that the lower back and leg pain was immediately so severe that he could not stand up.

I also find it inconsistent that Claimant explained that he was hesitant to report his back pain to the physicians who first treated him (i.e., physicians in Bosnia and Dr. Calkins) because he did not want to complain too much. According to Claimant, "if you complain you're not going to go back to work." (T 108) This statement might explain why there is no documented report of Claimant's alleged back injury shortly after the accident, except that Claimant also testified that he sought treatment for his back pain immediately after the accident. Claimant stated he told the physicians in Bosnia about his back pain: "I told [a neurosurgeon in Bosnia] the main, the main pain is in my arm, but I do have pain that was in my lower back." (T 108, 167) Claimant also stated that Dr. Calkins specifically treated him for these back problems: "He injected me in my back with, I believe, it's steroid." (T 109) Therefore, I reject Claimant's explanation (i.e., his desire to return to work) for the absence of any report documenting lower back and left leg pain immediately after the accident.

Finally, Employer argues that Claimant's proof "hinges upon his credibility" and that he should not be found to be a credible witness under Federal Rule of Evidence 609 because of his criminal record. (Employer's Brief, pp. 2-3) Employer introduced evidence of Claimant's July 19, 1999 criminal conviction in the Commonwealth of Pennsylvania for indecent assault pursuant to 18 Pa. C. S. A. § 3126. Claimant was given a sentence of imprisonment for 5 to 23 months for this violation. (T 246-248; EX 25, pp. 45-46) The Department of Labor's Rules of Practice and

Procedure for Administrative Hearings adopt much of Federal Rule of Evidence 609. 29 C.F.R. § 18.609(a). Section 18.609 states:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or involved dishonesty or false statement, regardless of the punishment.

Under Pennsylvania law, the crime of indecent assault is punishable by a maximum of five years imprisonment for a misdemeanor of the first degree and two years imprisonment for a misdemeanor of the second degree. 18 Pa. C. S. A. § 3126(b); § 1104. Although, it is unclear from the record which degree of misdemeanor Claimant was convicted under, both are punishable by imprisonment of more than one year. 18 Pa. C. S. A. § 1104.

At the hearing, Claimant objected to the admission of the criminal conviction, arguing that it is more prejudicial than probative of Claimant's truthfulness, relying on Rule 609 of the Federal Rules of Evidence. (T 21) However, the Rules of Practice and Procedure for Administrative Hearings do not contain this balancing test that is required by the Federal Rules of Evidence. Nevertheless, I find it appropriate, on balance, to consider Claimant's conviction as it affects his credibility with regard to the etiology of his back condition. Although I give this 1999 conviction less weight than the inconsistencies in Claimant's testimony set forth above, pursuant to the Departments' Rules of Practice and Procedure I find that the 1999 conviction adversely affects the credibility of Claimant's testimony regarding the causation of his back condition.

In addition to the medical opinion evidence and Claimant's testimony outlined above, the record contains testimony from Claimant's wife, Karen J. Pittelli. Ms. Pittelli stated that Claimant returned to the United States from Bosnia in late March 1996 and that she recalled him complaining of pains in his neck, shoulders, and lower back and left leg. Ms. Pittelli also stated, "I don't remember anything real severe with his shoulder. I mean, that kind of contradicts, because I was wondering why Dr. Calkins was working up his shoulders so much, to be honest." (T 203) I find this testimony is outweighed by the medical opinion of Dr. DiBenedetto which I find establishes that Claimant's back condition was unrelated to the March 23, 1996 accident.

In weighing all of the record evidence, I find that the medical report of Dr. DiBenedetto is the only one that provides any meaningful analysis of the etiology of Claimant's back condition. Further, for the reasons set forth above, I find that Claimant's contentions that he injured his back on March 26, 1006 are not credible. Therefore, and for the other reasons previously discussed, I find that the record as a whole fails to establish that Claimant's low back and left leg pain are causally related to the on-the-job accident on March 23, 1996. Consequently, Employer is not liable for any disability due to Claimant's back condition or for treatment of that condition.

3. Claimant is permanently totally disabled due to his back condition

Assuming *arguendo*, that Claimant had established that his lower back and left leg pain arose out of the March 23, 1996 accident, Claimant next bears the burden of proving the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 B.R.B.S. 56, 59 (1980). Disability is an "incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is therefore an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 B.R.B.S. 100, 110 (1991). To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to the work-related injury. Harrison v. Todd Pacific Shipyards Corp., 21 B.R.B.S. 339 (1988); Elliott v. C & P Telephone Co., 16 B.R.B.S. 89 (1984). If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). If the employer establishes suitable alternative employment, the claimant may nevertheless still be found to be totally disabled if, with reasonable diligence, the claimant is unable to secure that employment. Id. at 1043.

Claimant testified that he has been unable to perform his former job as a truck driver due to his back condition. Prior to his employment with Employer, Claimant worked full time as a truck driver for Glen Moore, Inc., where his earnings were $700 - $1,000 per week. Claimant stated that the trucking business is erratic and his wages were not consistent. (T 156-158) Claimant spends most of his time working on his woodcrafting hobby, which he explained helps him to avoid getting depressed. (T 119-120)

Claimant testified that from about June 1997 until January 1998 he owned and operated a restaurant, but this proved to be unsuccessful. Claimant also purchased a tractor in October 2000 and employs drivers who operate it. Claimant testified that he shares a percentage of this operation's profits with his drivers, but stated that this has not been a profitable business. (T 124, 174-187, 189-191) Claimant testified that his woodworking hobby is therapeutic and that it would not be a profitable business , based on his understanding of the craft-selling business. (T 188) Claimant explained that, at present, he is not actively seeking employment. (T 193) Claimant also testified that he investigated the possibility of employment with Hess Trucking, Inc. and Glen Moore, Inc., but that neither company would hire him due to his back condition. (T 194)

Several physicians of record agree that Claimant's back condition poses a major impediment to Claimant ever working again. Dr. Park opined that Claimant is totally disabled from performing any employment and that this condition reached maximum medical improvement in May 2001. Dr. Perry Argires and Dr. James Argires both performed several surgeries on Claimant's back and eventually concluded in 1998 that Claimant's back pain was a totally disabling condition that prevented him from working. (CX 8-A) Dr. Lin also stated that further surgery would not improve Claimant's back condition and that he should be limited to sedentary employment. (EX 37, p. 6) Dr.

Steinman opined that Claimant was "totally disabled for all practical purposes . . . I cannot imagine anybody hiring him after 5 low back surgeries." (CX 8-B)

I find Claimant's testimony regarding his back pain is supported by the several doctors who opined that Claimant's back condition is so severe that he is unable to return to gainful employment. Dr. Park treated Claimant on several occasions since July 1996 and has extensively documented Claimant's treatment for back pain. Dr. Perry Argires and Dr. James Argires documented several back surgeries since approximately 1997 that were attempted to help alleviate Claimant's back pain but also concluded that Claimant could not return to work. I find these reports of Dr. Park, Dr. Perry Argires, Dr. James Argires, Dr. Steinman, and Dr. Lin to be credible and well-documented. I also note that Claimant has undergone five back surgeries that have not alleviated his pain, and conclude that this indicates that Claimant's back pain is severe. Consequently, I find that the testimony of Claimant, together with the reports of Dr. Park, Dr. Perry Argires, Dr. James Argires, Dr. Lin, and Dr. Steinman establish that, due to his back condition, Claimant is unable to return to his job with Employer.

Employer argues in its responsive brief that the medical opinions of Dr. Bednarz, Dr. DiBenedetto, Dr. Wolf, Dr. Lin, Dr. Litton, and Dr. Calkins support a finding that Claimant is only partially disabled by his back condition. (Responsive Brief, p. 5) However, Dr. Calkins did not offer an opinion regarding Claimant's lower back and left leg condition since, as previously noted, Dr. Calkins initially treated Claimant shortly after his injury for right arm and shoulder pain. Dr. Litton believed that Claimant exhibited signs of "symptom magnification" and that no objective evidence supported Claimant's assertions regarding his levels of pain. Dr. Bednarz, Dr. DiBenedetto, Dr. Wolf and Dr. Lin each examined Claimant and admitted that Claimant had, at minimum, some pain in his back. These physicians concluded that no objective medical evidence supported Claimant's reported levels of "subjective" pain or that Claimant had "no significant findings." However, I find it significant that Claimant underwent five operations on his lower back and spinal cord. Dr. Perry Argires and Dr. James Argires documented at least two of these procedures and reported that MRI examinations showed severe lumbar diskogenic disease on February 25, 1999 and spinal stenosis on July 17, 1999. (CX 8-A) Consequently, I find that (contrary to the assertions of Dr. Bednarz, Dr. DiBenedetto, Dr. Wolf, Dr. Lin, and Dr. Litton) there is objective medical evidence in the form of MRI's and five back surgeries that support the determination that Claimant is unable to perform the job that he held with Employer. Consequently, unless Employer can establish that suitable alternative employment is available for Claimant, he must be found totally disabled due to his back condition.

Employer has presented evidence of suitable alternative employment that Claimant could perform, arguing that he is not totally disabled. (Employer's Brief, pp. 7-11)

Ken Caldwell, a vocational manager with ROI, Inc., performed a job analysis and labor market survey on December 20, 2000 and found that there were several dispatcher positions available with trucking companies in the Carlisle area. The dispatcher positions were mostly sedentary in nature and involved organizing, scheduling, and assisting truck drivers while they made deliveries. Mr. Caldwell reported that dispatcher positions were available at Hess Trucking, Armston, and CF Motorfreight.

Mr. Caldwell based his reports upon an evaluation of Claimant's prior work history and the work restrictions mentioned by Dr. Bednarz. Based on this evaluation, Mr. Caldwell opined that Claimant would be able to perform the requirements of the dispatcher position. (EX 24) Claimant testified that he investigated employment with these employers but that they did not have any job openings suitable for him. (T 128)

Cindy Tyson testified in a deposition taken on October 10, 2002 in which she reiterated many of the findings of her progress reports dated May 1 and May 30, 2002. Ms. Tyson is a vocational consultant for Genex, Incorporated, a private rehabilitation company that provides medical and vocational case management services. (EX 46, p. 3) Ms. Tyson stated that Claimant previously interviewed with Ken Caldwell and that she was aware of several reports of Mr. Caldwell that contained labor market studies and vocational assessments for Claimant. (EX 46, pp. 7-11) Ms. Tyson also reviewed the work restrictions that Dr. Bednarz created for Claimant and noted that Claimant possessed some computer skills. (EX 46, pp. 14-15) Ms. Tyson contacted potential employers identified by Mr. Caldwell for the purpose of determining if there were any positions available in truck dispatching or owner-operator positions. (EX 46, p. 10-11) Ms. Tyson also performed labor market surveys in April and May of 2002. (EX 46, p. 15; EX 23) Ms. Tyson stated that, at that time, truck dispatcher jobs were available with Daily Express, Inc. and ABF Freight Systems, Inc. and she opined that Claimant was capable of performing such jobs. (EX 46, p. 25-26) Ms. Tyson also identified an open position with the Patriot News as a dispatcher, which she opined Claimant was capable of performing, considering Claimant's work restrictions. (EX 46, p. 33) Additionally, Ms. Tyson identified an open position with Mobile Imaging, Inc. as a dispatcher, which she again opined Claimant could perform. (EX 46, p. 36) Ms. Tyson explained that these dispatcher positions were sedentary and required little computer experience. (EX 46, p. 39) Ms. Tyson also investigated the possibility that Claimant could sell his wood sculptures and she opined that Claimant could work for a private craft company. (EX 46, p. 47) Ms. Tyson also investigated Claimant's activities as an owner-operator of a tractor and stated that Claimant could profitably operate such a business. (EX 46, pp. 50-58)

Juliette Ferreira testified in deposition taken on December 16, 2002 and reiterated her August and September, 2002 reports and labor market surveys. (EX 23, pp. 10-20) Ms. Ferreira is a vocational case manager for Genex, Inc. (EX 47, p. 4) Ms. Ferreira explained that she conducted a labor market survey about August, 2002, and identified ABF Freight System, Inc. and Daily Express, Inc. as companies that had dispatcher positions available. (EX 47, p. 6; EX 23, p. 13) Subsequently, Ms. Ferreira sent an August 29, 2002 letter to Claimant, instructing him to visit these employers on September 6, 2002 and complete employment applications. Specifically, the letter instructed Claimant to arrive at Daily Express, Inc. at 10:30 a.m. and ABF Freight System, Inc. at 11:30 a.m. (EX 47, pp. 12-14; EX 23, p. 10) Ms. Ferreira testified that on September 6, 2002 she visited Daily Express, Inc. and observed a dispatcher at work. Ms. Ferreira explained that this was a sedentary position that involved coordinating and assisting trucking operations. Ms. Ferreira waited from 10:25 a.m. until 10:40 a.m. for Claimant to arrive but he never appeared, to the best of her knowledge. Ms. Ferreira also visited ABF Freight, Inc. on September 6, 2002 at 11:30 a.m. Ms.

Ferreira confirmed that the dispatcher position was sedentary work. Ms. Ferreira waited until 11:47 a.m. but Claimant never showed up to fill out an application.

On September 13, 2002, Claimant left Ms. Ferreira a voice mail message explaining that he had been in Florida and would not be back until September 19, 2002. Ms. Ferreira twice attempted to call Claimant on his cell phone in Florida but each time a recorded message told her that Claimant was unavailable. (EX 47, pp. 14-15; EX 23, p. 19) Subsequently, Ms. Ferreira made arrangements for Claimant to complete these applications on September 27, 2002, after he returned from Florida. (EX 47, p. 18; EX 23, p. 17) Ms. Ferreira later confirmed that Claimant filled out an application with ABF Freight, Inc. on September 27, 2002, but stated that the dispatcher position was no longer available at that time. (EX 47, p. 29) Claimant stated at the hearing that he also investigated employment positions with Glen Moore, Inc., for whom he had worked prior to his job with Employer, but that no positions were available. (T 193-194)

Harry Smith, vice president of finance for Daily Express, testified at the hearing on October 11, 2002 that no dispatcher positions were available on September 27, 2002. (T 51) Mr. Smith was aware of an application completed by Claimant on that date. Mr. Smith testified that while there are currently openings for owner-operator positions, it has been 18 months to approximately two years since Daily Express has had a dispatcher position available. (T 53-56) David Ayers, a senior operations supervisor for ABF testified at the hearing that Claimant applied for work as a dispatcher in late September, 2002 but no jobs were available at that time. (T 58-59) Mr. Ayers explained that the last dispatcher opening that ABF had was approximately four months earlier and that ABF did not anticipate having any openings for the dispatcher position in the near future. (T 59)

I find that Employer has presented evidence of suitable alternative employment. Employer identified truck dispatching positions in 2002 with Daily Express, Inc., and ABF Freight, Inc. that took into account Claimant's severe back pain. However, I also find that Claimant used reasonable diligence to secure this employment but was unsuccessful. Mr. Ayers and Mr. Smith both recalled that Claimant applied for jobs with Daily Express, Inc. and ABF Freight but that no positions were available. Additionally, Ms. Ferreira testified that Claimant applied for the dispatcher positions upon his return from Florida but that no jobs were available. While Ms. Tyson opined that Claimant could make his woodworking hobby into a business, Dr. Park testified that the woodworking was designed to be a "therapeutic" hobby. I find that Claimant's woodworking is a hobby at which it is unlikely that he could earn more than a de minimis amount of money. No further details were provided regarding the positions Ms. Tyson identified with Patriot News and Mobile Imaging, Inc. However, based on the testimony of Mr. Smith and Mr. Ayers that supports Claimant's testimony, I find that Claimant pursued all positions he was presented with. Therefore, the positions with Patriot and Mobile (about which I note Employer makes no argument) do not constitute suitable alternative employment.

In its responsive brief, Employer argues that Claimant refuses to actively pursue employment. I give this argument no weight because Employer bears the burden of establishing suitable alternative employment once Claimant has established that he is unable to perform his usual job with Employer.

As noted above, the evidence shows that Claimant cooperated with Employer's vocational experts and applied for the trucking positions that they identified. Additionally, the two primary truck dispatch positions at ABF Freight and Daily Express, Inc. identified by Employer's vocational experts both were rebutted by the testimony of Mr. Ayers and Mr. Smith who testified that their companies have not been looking for dispatchers.

In sum, I find that Claimant has established that he is permanently totally disabled due to his back condition. I accept Dr. Park's determination that Claimant reached maximum medical improvement onMay 24, 2001, due to the fact that Dr. Park is Claimant's treating physician. (CX 2, p. 17)

4. Claimant's average weekly wage is $351.05 pursuant to section 10(a)

Claimant contends that his average weekly wage should be based on his earnings at the time of his injury pursuant to § 10(c). Claimant argues that his average weekly wage cannot be calculated based on the earnings from his employment during the year prior to the March 23, 1996 accident, as would be required under § 10(a). Claimant argues in his brief that, Claimant "had reasonable expectations for continued employment; his job overseas was substantially dissimilar in the risks, duties, income (paid by the mile versus paid by the hour) and withholdings for income taxes and social security." (Claimant's Brief, p. 20)

Employer argues that because Claimant worked as a commercial driver for substantially the entire year preceding his injury, his average weekly wage should be $328.79, calculated pursuant to § 10(a). In the alternative, Employer argues that if Claimant's wage is to be calculated pursuant to § 10(c), I should find that the average weekly wage is $362.15 because Claimant's employment with Employer was only temporary employment and post-injury wages should not be considered in an average weekly wage computation. (Employer's Brief, p. 11)

The Act sets forth three alternative methods for determining claimant's annual wages, which are then divided by 52, pursuant to § 10(d), to arrive at an average weekly wage. Section 10(a) and (b) are the provisions relevant to a determination of an employee's average annual wages where the injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to § 10(c) if subsections (a) or (b) cannot be reasonably and fairly applied. The object of § 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. Empire v. United Stevedores v. Gatlin, 936 F.2d 819 (5th Cir. 1991); Richardson v. Safeway Stores, Inc., 14 B.R.B.S. 855 (1982). It is well established that a fact finder has broad discretion in determining an employee's annual earning capacity under § 10(c). Patterson v. Omniplex World Services, 36 B.R.B.S. 149 (2003).

Scott Curd testified in a deposition on November 21, 2002 that Claimant was hired by Employer under a contract that provided for a minimum of three months' employment, and a maximum that depended upon "job duration." (EX 10, p. 11; EX 9) Mr. Curd explained that "job duration" means that Claimant's employment could have been longer than three months based on the

military's needs. Employer also submitted a list of truck drivers hired for the Bosnia operation, which showed the beginning and ending dates of employment for these drivers. (EX 10, pp. 15-17; EX 11) Mr. Curd reviewed this list and determined that most drivers worked "much less than one year." (EX 10, p. 17) Mr. Curd also testified that, under the terms of the contract, Claimant's work with Employer was limited to the area of operations for the Bosnia peacekeeping mission: Croatia, Hungary, and Bosnia. Any employment for another area would have required another contract. Mr. Curd stated that most employees who were given another contract to work after the Bosnia work ended were sent to a nearby operation, for example in Hungary. (EX 10, p. 34) Mr. Curd stated that Employer began to reduce the number of employees in Bosnia in April 1996 due to the fact that much of the initial construction and support work these employees were hired to complete had tapered off. (EX 10, p. 17-25) Curd also stated that no social security benefits or taxes were withheld from employees' pay. (EX 10, p. 33) Employees were also given hazard pay due to the fact Employer recognized the hardship of work in support of a military operation overseas. (EX 10, p. 37)

In 1995, prior to his employment with Employer, Claimant worked as an independent, owner-operator truck driver for the following companies and reported the following wages.

Glen Moore Transport, Inc. (January, 1995 - December, 1995):	$12,087.07
Arctic Express, Inc. (September, 1995 - October, 1995):	$2,166.60
Central Penn Truck Service, Inc. (December, 1995):	$325.50

(CX 6)

Claimant also reported that he earned self-employment wages as a truck driver from October 1995 to February 1, 1996. These earnings from self-employment total $28,607.00. However, Claimant indicated that he actually had negative net earnings, or a loss of $1,401.00. (CX 6) Claimant's Internal Revenue Service Forms W-2 for 1995 and his Social Security Earnings Statement also show the above earnings for the year prior to his injury on March 23, 1996.[10] (EX 19, pp. 12-14; EX 20) Claimant also reported that his net earnings were $3,678.00 from employment with Employer prior to his injury on March 23, 1996. (CX 6)

I find that § 10(a) must be used to calculate Claimant's average weekly wage. Claimant's work in Bosnia as a truck driver supporting a military operation involved the same skill, knowledge, and expertise as that of a commercial truck driver in the United States. Section 10(a) is used to calculate average weekly wages when the injured employee worked in the employment in which he was working at the time of the injury for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Employment at the time of injury is considered to be similar to prior employment when it requires the same skills, knowledge, and expertise. Mulcare v. Traveler's

[10]Claimant's W-2 from his work with Glen Moore Transport, Inc. actually shows that his "wages, tips, other compensation" was $9,718.37. However, I note that his state wages and tips were reported to be $12,087.07. (EX 19, p. 3). Thus, I credit Claimant with earning $12,087.07 from this employment.

Ins. Co., 18 B.R.B.S. 158, 160 (1986). While I find that the working environment in Bosnia was different from the domestic trucking environment of the United States, I also find that the work required the same skills as a domestic truck driver. In Mulcare, an electrician who worked in Washington, D.C. accepted work in Saudi Arabia as an electrician. The Board noted that, while he was in Saudi Arabia, the claimant did essentially the same work, and utilized the same skills, knowledge and experience required for an electrician in the United States. The Board rejected the argument that the considerable differences in compensation, benefits, geographic location, and job duties made the employment in Saudi Arabia different from employment in the United States. Id. at 159 - 161. Claimant stated that the trucks he drove in Bosnia were the same as the trucks he drove in the United States. (T 160-162) Although the environment surrounding the employment was different, I find that Claimant's employment driving trucks in the United States is sufficiently similar to the work driving trucks in Bosnia to warrant the use of § 10(a).

Claimant also worked for substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a). Claimant worked approximately ten months with Glen Moore Trucking and Employer between March 23, 1995 and March 23, 1996. Claimant also reported that he drove trucks and earned income with Arctic Express, Inc., Central Penn Truck Service, Inc., and his own independent truck driving operation consistently between 1995 and 1996. (T 69-73; CX 6; EX 19; EX 20) While Claimant stated that he was assigned to "light duty" for a brief period with Glen Moore and that he was then not really working driving trucks, I find that this brief period does not outweigh the greater amount of time that Claimant earned income from driving trucks. (T 74-76)

I disagree with Claimant's contention that § 10(c) should be used to calculate his average weekly wage and that I should calculate Claimant's average weekly wages based only upon his earnings at the time of the injury. (Claimant's Brief, p. 20) Mr. Curd's testimony was that Employer only hired workers for an initial three month commitment with only a possibility of an extended employment duration. The only extended duration that an employee could reasonably expect would be assignment to Croatia, Hungary, or Bosnia, which I find contradicts Claimant's expectations about possible future assignment for five years in Vietnam. Mr. Curd also testified that most of the drivers worked much less than a year and the entire operation began to scale back in April 1996, after the initial three month assignment expired. I also find that Claimant's pre-injury earnings should govern this determination because post-injury wages may be considered in exceptional circumstances. Walker v. Washington, 793 F.2d 319 (D.C. Cir. 1986). Based on the forgoing, it would not be appropriate to limit the earnings considered to Claimant's earnings at the time of the injury and ignore the prior year's employment.

The evidence shows that Claimant's earnings in 1995 were $2,166.60 from Arctic Express, $325.50 from Central Penn Trucking, $12,087.07 from Glen Moore Transport, and $3,678.00 from Employer. (CX 6; EX 19, 20) Claimant's total earnings in the year preceding his March 23, 1996

injury are $18,257.17. Pursuant to the provisions of § 10(a) and § 10(d)(1), Claimant's average daily wage is $60.85 ($18,257.17/300) and his average weekly wage is $351.05 ($60.85 X 300/52).[11]

6. Employer is entitled to a credit for Claimant's failure to report earnings

Employer argues that Claimant deliberately failed to report earnings information when Employer requested him to complete the Form LS-200 earnings statements for the periods of March 24, 1996 through December 31, 1997 and January 1, 2000 through December 31, 2000.[12] (EX 39) Employer requested that Claimant complete an LS-200 form on February 7, 2002. Claimant returned these forms on April 29, 2002 and left the forms blank. (EX 39, pp. 3-4, 15-19) Employer made several additional requests for Claimant to report earnings on April 10, 2002, May 10, 2002, and June 28, 2002. On April 29, 2002, Claimant submitted some tax forms, but again left the LS-200 form blank. (EX 39, pp. 15-25) On June 7, 2002, Claimant again submitted copies of previously submitted tax forms and blank LS-200 forms and stated that he would not submit any further information to Employer. (EX 40) Claimant offered no argument at the hearing or in his post-hearing brief regarding these failures to report earnings.

Section 8(j) provides that an employee receiving disability compensation has an obligation to provide the employer with requested semiannual reports of his or her earnings from employment or self-employment. Additionally, any employee who fails to report earnings (§ 8(j)(2)(A)) or "knowingly and willfully omits or understates" earnings (§ 8(j)(2)(B)) forfeits the right to receive benefits for that period. Huntley v. Newport News Shipbuilding and Dry Dock Company, 32 B.R.B.S. 254 (1998). Further, a claimant has 30 days to respond to a request for earnings information, otherwise the claimant faces forfeiture of benefits for the requested period. 20 C.F.R. § 702.286(a); Huntley, 32 B.R.B.S. 254.

Printed on the top of the front side of Claimant's LS-200 forms is the following statement.

> Instructions to Employee: You are required to complete and sign this form and return it to the employer/insurance carrier/special fund listed in item 4 within 30 days after receipt even if you have no earnings to report (20 C.F.R. § 702.286).

(EX 39-40, LS-200 Forms)

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[11]For purposes of calculation under section 10(a), I find that Claimant was a six-day worker. Employer does not controvert such a finding. (Employer's Brief, p. 14)

[12]On LS-200 forms that requested earnings information from January 1, 1998 through January 1, 2000, Claimant wrote, "NONE." Employer makes no argument regarding these periods and I accordingly find that Claimant provided a report of his earnings for this period. (EX 40, pp. 25 - 27).

I find that the LS-200 alerted Claimant that he was required to report any earnings within 30 days. Therefore, I find that Claimant failed to report earnings as required and he violated § 8(j)(2)(A) of the Act.[13]

Section 8(j)(2)(B) provides that an employee who violates either subsection (A) or subsection (B)

> forfeits his right to compensation with respect to any period during which the employee was required to file such a report.

Further, § 8(j)(3) provides:

> Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

Under § 8(j)(3), the sole means by which an employer can recover forfeited compensation is by deducting the overpayment from future benefits that are due to the claimant. Stevedoring Services of America v. Eggert, 953 F.2d 552, 556-57 (9th Cir. 1992). As I have found that no future benefits are due to Claimant at this time, Employer cannot recover any "forfeited" compensation.

7. Employer is not required to pay two medical bills for Claimant's treatment at The Heart Group and Carlisle Hospital

Claimant stated at the hearing that Employer refused to authorize payment for Claimant's medical treatment at the Heart Group and Carlisle Hospital. (JX 1; T 38-40) However, no documentation was provided for this treatment, nor did Claimant make any further argument regarding this treatment. Employer notes in its brief that, "without such documentation, Claimant has failed to prove that either he or his providers are entitled to reimbursement for additional medical expenses," citing § 7(d) of the Act. As Claimant has not proffered any evidence or argument regarding this issue, I find that Employer is not responsible for paying these bills.

[13]I make no determination whether Claimant's omissions in the LS-200 were done "knowingly and willfully" under § 8(j)(2)(B) or § 31(a), since the penalty under § 8(j)(2)(B) is no different than that for a violation of § 8(j)(2)(A). Nor do I find that Claimant was generally "evasive" and "non-responsive" or that there is any evidence that Claimant deliberately hid income from Employer, as Employer contends. (Employer's Brief, p. 22) The record does not contain sufficient evidence to support Employer's contentions. Thus, there is no need to determine whether Claimant violated § 8(j)(2)(B).

C. Conclusion

My operative findings and conclusions are:

(1) Claimant's causally related shoulder and arm injuries fully resolved during the period in which Employer paid him compensation for temporary total disability. Consequently, Claimant is not entitled to additional compensation for these injuries. Employer continues to be responsible for benefits pursuant to § 7 of the Act for medical treatment related to Claimant's shoulder and arm injuries.

(2) Claimant has not established that his low back condition is causally related to the March 23, 1996 accident that occurred while he was working for Employer. Consequently, Claimant is not entitled to compensation or benefits pursuant to § 7 of the Act for disability or medical treatment related to his back condition.

ATTORNEY'S FEE

As there has not been a successful prosecution of the claim, Claimant's attorney is not entitled to a fee pursuant to § 28 of the Act.

ORDER

It is ORDERED that Garry W. Bolton's claim for compensation under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey